85-619

, No. 85-_____



IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MERRELL DOW PHARMACEUTICALS INC.,
Petitioner,

vs.

LARRY JAMES CHRISTOPHER THOMPSON AND DONNA LYNN THOMPSON AS NEXT FRIENDS AND GUARDIANS OF JESSICA ELIZABETH THOMPSON, LARRY JAMES CHRISTOPER THOMPSON, INDIVIDUALLY AND DONNA LYNN THOMPSON, INDIVIDUALLY, *et al.*,
Respondents.

**Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## QUESTIONS PRESENTED

1. Where a plaintiff alleges that a violation of a specific federal regulatory statute constitutes a rebuttable presumption of negligence and that such violation directly and proximately caused injury to plaintiff, does such claim, "necessarily depend" on resolution of an issue of federal law, so as to vest subject matter jurisdiction in the district court?

2. Where a claim which "necessarily depends" on resolution of an issue of federal law is joined with other claims of purely local law which would, if plaintiff prevails, obviate the federal question, does the pendency of such purely local claims deprive the district court of jurisdiction?[1]

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[1] The caption of the case in this Court does not reflect that there are two cases involved in this matter. The cases were decided together by the district court and were consolidated by the court of appeals. The names of the respondents in the second case are Neil Frazer MacTavish and Margaret MacTavish as Next Friends and guardians of Neil MacTavish, Neil Frazer MacTavish, individually, and Margaret MacTavish, individually.

Petitioner is a subsidiary of The Dow Chemical Company. The following subsidiaries and affiliates of The Dow Chemical Company have outstanding securities in the hands of the public: Dow Banking Corporation; Dow Chemical Iberica S.A.; Gruppo Lepetit S.p.A.; Ivon Watkins-Dow Limited; Laboratorios Industriales Farmaceuticos Ecuatorianos; Merrell Toraude et Compagnie; Oronzio De Nora Impianti Elettrochimici S.A.; and Pacific Chemicals Berhad.

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# SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1985

No. 85-

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MERRELL DOW PHARMACEUTICALS INC.,
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vs.

LARRY JAMES CHRISTOPHER THOMPSON AND DONNA LYNN THOMPSON AS NEXT FRIENDS AND GUARDIANS OF JESSICA ELIZABETH THOMPSON, LARRY JAMES CHRISTOPER THOMPSON, INDIVIDUALLY AND DONNA LYNN THOMPSON, INDIVIDUALLY,
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## Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petitioner, Merrell Dow Pharmaceuticals Inc., defendant below, prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Sixth Circuit reversing and remanding two cases to the United States District Court for the Southern District of Ohio with instructions to remand them to the state court from which they were removed.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 766 F.2d 1005 (6th Cir. 1985), and is printed in the Appendix at 1a. The opinion of the district court is unreported, and is printed in the Appendix at 4a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered and filed on July 15, 1985. (App. at 8a). The 90th day after such judgment was Sunday, October 13, 1985. This petition was filed on or before Monday, October 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

## STATUTORY PROVISIONS INVOLVED

This case involves allegations of violations of certain sections of the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040, as amended (21 U.S.C. § 301, *et seq.*) the pertinent provisions of which are set forth in the Appendix at 10a.

## STATEMENT OF THE CASE

This petition concerns the subject matter jurisdiction of a United States district court in two cases in which respondents' right to relief necessarily depends upon resolution of a substantial question of federal law. The appellate decision at issue has already been cited by the district court as a basis to nullify a jury verdict for petitioner in over two hundred additional lawsuits in which petitioner had prevailed in a protracted trial of common issues. (App. at 31a). Such verdict, if undisturbed, would result in defense judgments.

Respondents are parents and children who allege in their complaints that the ingestion during pregnancy of the pharmaceutical product Bendectin caused the children's birth defects.[2] Bendectin is a prescription drug which was marketed for the treatment of nausea and vomiting of pregnancy. Respondents are citizens and residents of the United Kingdom (Scotland) and Ontario, Canada. (App. at 13a, 22a) Petitioner is a pharmaceutical manufacturer incorporated in Delaware with its principal place of business in Hamilton County, Ohio. (App. at 13a, 23a). Respondents originally filed their actions in the Court of Common Pleas of Hamilton County, Ohio. (App. at 12a, 22a).

[2] Respondents' complaints are printed in the Appendix at 12a and 22a.



Respondents sued petitioner for violating the Federal Food, Drug and Cosmetic Act in regard to its product, Bendectin, which is manufactured, marketed and regulated in the United States. Any products ingested by respondents would not, however, have been petitioner's product. In their motion to remand, respondents alleged the product ingested to be Debendox, the tradename for the United Kingdom version of Bendectin.[3] (In fact, the Thompson respondents would have ingested the Canadian-made version of Bendectin.) Respondents did not sue the foreign manufacturers or sellers of those products, nor did they allege violations of the regulatory laws of those countries. (App. at 12a, 22a).

Numerous other foreign citizens had filed similar suits against petitioner prior to the time respondents filed the instant actions. All but one of the earlier actions had been dismissed by the District Court for the Southern District of Ohio, upon petitioner's motions, on grounds of *forum non conveniens*. Twelve of those dismissals, including actions by other Scottish citizens, had been upheld by the United States Court of Appeals for the Sixth Circuit. Several, including an action filed by citizens of Ontario, Canada, were on appeal at the time the instant actions were filed.

Subsequent to the precedent set by these dismissals and affirmances, respondents filed suit in the Court of Common Pleas of Hamilton County, Ohio. In their first "cause of action," respondents allege that petitioner was negligent in developing, marketing, producing, manufacturing, distributing, and selling the drug Bendectin. This cause of action makes no reference to the federal law. (App. at 13a, 24a). Respondents' fourth cause of action asserts that petitioner violated sub-section (n) of section 201 and subsections (a), (f)(2) and (j) of section 502 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 321(n), 352(a)(f)(2) and (j), by "misbranding" Bendectin, and that these violations "consti-

[3] In accordance with Rule 19.1 of the Rules of the Supreme Court of the United States, the record below, which contains the motion to remand filed by respondents, has not yet been certified to this Court.

tute a rebuttable presumption of negligence." (App. at 16a, 26a). Respondents allege that ". . . defendant's violation of said federal statutes directly and proximately caused the injuries suffered . . ." by them (App. at 18a, 27a).

Pursuant to 28 U.S.C. § 1441(b), and based on the fourth cause of action, petitioner removed both cases to the United States District Court for the Southern District of Ohio. Respondents moved the district court to remand the cases to the state court, claiming that the fourth causes of action did not confer federal question jurisdiction because they were based on state law. The district court found, however, that, in accordance with this Court's definitions of "arising under" jurisdiction set forth in *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), federal question jurisdiction did exist over the cases and that they were properly removed. (App. at 6a). Relying on its previous dismissals of actions brought by citizens and residents of foreign countries and the affirmances thereof, the district court then dismissed the actions, upon petitoner's motion, on grounds of *forum non conveniens*. (App. at 7a-8a).

Respondents appealed. The court of appeals reversed and remanded the cases to the district court with instructions to remand them to the state court. The court of appeals stated:

> Plaintiffs' causes of action referred to the FDCA [Food, Drug and Cosmetic Act] merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' causes of action did not necessarily depend upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court.

(App. at 3a). Thus, the appellate court ruled that, since respondents' non-federal negligence claim did not necessarily depend upon resolution of the federal question, no federal



jurisdiction could exist. It overruled the district court's conclusion that, since respondents' fourth causes of action would necessarily depend upon resolution of federal questions, the court had subject matter jurisdiction.

Based on this appellate decision, the district court also dismissed or remanded, for want of jurisdiction, over two hundred additional cases which had already been tried to verdict.[4] (App. at 31a). These cases were filed in Ohio courts upon complaints nearly identical to those filed by respondents. Some of these cases were removed by petitioner to federal court. Others were filed by plaintiffs in federal court alleging federal jurisdiction. Petitioner had prevailed in a consolidated "common issues" trial involving these cases and approximately nine hundred more. The jury concluded that Bendectin does not cause birth defects. Those cases were still pending before the district court on plaintiffs' motion for new trial, which has since been denied. The court of appeals' decision herein has thus affected not only the cases at bar, but has caused the revival of over two hundred additional actions against petitioner.

## REASONS FOR GRANTING THE WRIT

This case presents an important question of the subject matter jurisdiction of a district court over suits in which one cause of action alleges violations of federal law and another cause of action, based on the same legal theory, alleges a purely state law claim. The court of appeals' decision on these questions conflicts with this Court's decision in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). This Court should grant certiorari to clarify that: 1) a cause of action may "arise under" a federal law where the right to relief claimed *in that cause of action* necessarily

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[4] The cases at bar are a part of this remand order. The order of remand has been stayed upon petitioner's motion requesting amendment of other aspects of the order.

depends on a substantial question of federal law; and 2) the joining of a purely local cause of action with a cause of action arising under federal law, though both request the same relief, does not destroy federal question jurisdiction.

## I. WHERE A PLAINTIFF ALLEGES THAT A VIOLATION OF A SPECIFIC FEDERAL REGULATORY STATUTE CONSTITUTES A REBUTTABLE PRESUMPTION OF NEGLIGENCE AND THAT SUCH VIOLATION HAS DIRECTLY AND PROXIMATELY CAUSED PLAINTIFFS' INJURIES, SUCH CLAIM "NECESSARILY DEPENDS" ON RESOLUTION OF AN ISSUE OF FEDERAL LAW, SO AS TO VEST SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT.

### A. THE DECISION BELOW CONFLICTS WITH A RECENT DECISION OF THIS COURT IN THAT IT DENIES SUBJECT MATTER JURISIDICTION OVER A CLAIM NECESSARILY DEPENDENT ON RESOLUTION OF A SUBSTANTIAL FEDERAL ISSUE.

This Court's decision in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), is the most recent statement of the scope of subject matter jurisdiction over claims "arising under" federal law. The *Franchise* decision states:

> Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action *or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.*

*Id.* at 28 (emphasis added).



In the cases at bar, it was uncontested that the Federal Food, Drug and Cosmetic Act does not provide a private right of action for its violation.[5] Thus, federal law does not "create" the cause of action. Respondents' right to relief for petitioner's alleged violations of the Act does, however, "necessarily depend" on resolution of a substantial question of federal law. This the appellate court neither disputed nor acknowledged. It concerned itself solely with whether the common law negligence claim was also dependent for its outcome on the federal question.

In *Franchise*, this Court restated one of the bases for jurisdiction over claims "arising under" federal law: "We have often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law, *see, e.g., Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *Hopkins* v. *Walker*, 244 U.S. 486 (1917)." *Id.* at 9.

Based on the law set forth in *Franchise*, petitioner removed the cases at bar from state court because the fourth cause of action in each arose under federal law: The vindication of respondents' right under state law would necessarily turn on a construction of federal law. As the district court held: "Although plaintiffs' fourth cause of action is technically a claim for negligence pursuant to state law, the sole basis for the claim is the alleged violation of the federal Act by defendant." (App. at 7a-8a).

In *Franchise*, this Court held: "[F]ederal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of one of the

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[5] It is also uncontested that the fourth cause of action alleges a private right of action for violation of the Federal Food, Drug and Cosmetic Act. Neither party had moved for a dismissal of that allegation or for a complaint amendment to delete it prior to the dismissal of this case by the district court on *forum non conveniens* grounds. Thus, while the parties may now agree that there is no private right of action, the allegation alone in the complaint supplied a sufficient basis for federal jurisdiction.

well-pleaded state claims, or that one or the other claim is 'really' one of federal law." *Id.* at 13 (emphasis added). The appellate court below read this pronouncement as if it required more than one state claim to be dependent on the federal question. It failed to recognize that, without first construing and applying the federal statute, there is no right to relief available to respondents under their fourth cause of action. Federal law is a necessary element, indeed *the* essential ingredient, of *one* of respondents' state claims.

The use of the term "negligence" to categorize the first and fourth causes of action was an oversimplification by the court of appeals. The two claims were quite distinct. Common law negligence is a breach of a duty of care owed by petitioner to respondents which allegedly proximately caused their injuries. This was the first cause of action. The fourth cause of action dispenses with the need to prove the standard of care and breach of that standard. It substitutes a violation of federal law for these two elements. For the fourth cause of action, it is not only upon the acts of petitioner, but also upon their character as *unlawful as a federal matter*, that respondents founded their claim.

Under the first cause of action, respondents must prove breach of due care. Under the fourth, petitioner has the duty to go forward with proof of its due care or suffer the adverse effect of the presumption. The only point in common between the first and fourth causes of action is the necessity of proving proximately caused injury, a necessity in *every* tort claim. The easy label of "negligence" overlooks their predominating differences.

The Federal Food, Drug and Cosmetic Act is a comprehensive statute which elaborately regulates the manufacture and marketing of pharmaceutical products. While the parties now agree that it does not provide a private right of action for its alleged violation, respondents nonetheless asserted a cause of action for its violation by alleging a state law "effect" for its violation. It is clear that it is the federal violation upon which that claim is based and depends. As stated in *Franchise*:



> [F]or purposes of § 1331 an action "arises under" federal law "if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law."

*Id.* at 9 (citations omitted). This definition was read by the appellate court below in the narrowest fashion. The district court had ruled that, in order for the respondents to secure the relief they sought *in the fourth cause of action*, they would be obliged to establish both the applicability to their cases of the Federal Food, Drug and Cosmetic Act and the violations which they asserted. The court of appeals did not disagree, but found the essential federal element of the fourth cause of action inadequate to vest jurisdiction because of respondents' state law negligence claim.

The conclusion which the district court held decisive of jurisdiction, i.e., that the alleged Food, Drug and Cosmetic Act violations were an essential element of respondents' fourth cause of action, was an issue which the court of appeals found no necessity to reach. Had the court of appeals analyzed each of respondents' causes of action separately as *Franchise* requires, it would necessarily have found that the fourth cause of action conferred jurisdiction.

The effect of the court of appeals' decision is to leave to the state court the necessity to make a detailed analysis and application of the statute allegedly violated. This would include the unusual allegations made by respondents herein that the statutory and regulatory requirements of the United States Food, Drug and Cosmetic Act should be "exported" to govern the activities of foreign pharmaceutical companies in other nations, the United Kingdom and Canada in this instance. Respondents' allegations also raise the issue of the interaction of United States law and parallel foreign regulatory schemes. No federal court has yet confronted the issue of extraterritorial application of the Food, Drug and Cosmetic Act. This question should not first be addressed, without guidance, by a state court.

## II. WHERE A CLAIM WHICH "NECESSARILY DEPENDS" ON RESOLUTION OF AN ISSUE OF FEDERAL LAW IS JOINED WITH OTHER CLAIMS OF PURELY LOCAL LAW WHICH WOULD, IF PLAINTIFF PREVAILS, OBVIATE THE FEDERAL QUESTION, THE PENDENCY OF SUCH LOCAL CLAIMS DOES NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION.

### A. THE DECISION OF THE COURT OF APPEALS WOULD SIGNIFICANTLY CURTAIL FEDERAL SUBJECT MATTER JURISDICTION IN CASES INVOLVING PARALLEL, PENDENT LOCAL CLAIMS.

In *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court held that federal question jurisdiction exists when a "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* at 27-28. The Court's reference to "the cause of action" and "right to relief" in the singular *did not*, however, imply that a lawsuit would necessarily have *only one* cause of action and *only one* right to relief asserted. As the Court further stated:

> Appellant's complaint sets forth two 'causes of action,' one of which expressly refers to ERISA: if *either* comes within the original jurisdiction of the federal courts, removal was proper as to the whole case . . . . [O]riginal federal jurisdiction is unavailable unless it appears that some substantial, disputed question of federal law is a necessary element of *one* of the well-pleaded state claims or that *one or the other* claim is 'really' one of federal law. . . .

*Id.* (emphasis added).



The court of appeals, however, misread these pronouncements. It looked beyond the cause of action which raised the federal question and examined the *entire complaint* to see whether respondents might prevail on the state law negligence claim without resolving the federal question. Jurisdiction was held lacking because a different and separately pleaded cause of action (but one without reference to federal law) gave respondents a potential "right to relief" that did not "necessarily depend" on the resolution of the federal question. Thus, a new rule of law was articulated: If a plaintiff *might* prevail on a state law claim without relying on a claim involving an essential federal question, there is no federal jurisdiction and removal is improper.

In the cases at bar, the complaints each contain a first and fourth cause of action which are separate and distinct. The first cause of action alleges common law negligence and makes no reference to federal law. The fourth cause of action asserts and relies upon violations of a federal statute and a substantive presumption resulting therefrom. The first and fourth causes of action are not interchangeable.

The court of appeals' decision overlooks this Court's instruction in *Franchise* that *each* claim be considered separately in determining whether there is a federal question. A court may not merge causes of action to make this determination. Subject matter jurisdiction is available so long as a "question of federal law is a necessary element of *one* of the well-pleaded state claims. . . ." *Id.* at 13 (emphasis added). The decision below compels the unwarranted denial of subject matter jurisdiction whenever a complaint includes an additional, state-law-based claim not involving a federal question. This opinion impairs both the "consistent application" of the federal jurisdictional statutes that this Court emphasized in *Franchise*, and the objective of the uniform application of the removal statute noted in *Shamrock Oil and Gas Corp.* v. *Sheetes*, 313 U.S. 100, 104 (1940).

The court of appeals further erred in giving an overbroad reading to "right to relief." The court reasoned that, if the

respondents might prevail on a claim other than the one presenting the federal question, then their "right to relief," in this broadest sense, could not "necessarily depend" on the resolution of the federal question. Viewing the complaint as it did, as including a single claim of negligence and requesting a single right to relief, the court of appeals saw the federal statutory violations as but one means for potentially granting that single right to relief. This rule of law erroneously extends the *Franchise* decision to curtail federal jurisdiction over claims which are necessarily dependent on substantial federal questions.

### B. THE COURT OF APPEALS ERRONEOUSLY DISTINGUISHED BETWEEN FEDERALLY CREATED CLAIMS AND CLAIMS NECESSARILY DEPENDENT ON A FEDERAL QUESTION, RULING THAT THE LATTER TYPE OF FEDERAL QUESTION JURISDICTION COULD NOT SURVIVE THE PENDENCY OF LOCAL CLAIMS WHICH SEEK THE SAME RELIEF.

Traditional concepts of subject matter jurisdiction of the federal courts recognize that federal questions often arise in lawsuits which also present claims of a purely local character. So long as these claims arise out of the same nucleus of facts, such that they comprise a single "case" which a plaintiff would normally try in one suit, the federal court has jurisdiction to decide them *all*. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966).

The fact that a non-federal claim might be dispositive and theoretically moot the federal question has not been held to destroy jurisdiction. For example, where the federal question is of a constitutional character, the objective of the court is to avoid decision of the federal question if possible, and to dispose of the whole case on state law grounds. *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909).



"Pendent jurisdiction . . . exists whenever there is a claim 'arising under . . . the Laws of the United States,' . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' " *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). This pronouncement makes no distinction between federally created claims and claims necessarily dependent on resolution of federal questions. Both "arise under" federal law and both can support pendent state claims. Under the decision of the court of appeals, however, pendent jurisdiction would only be available when the complaint states a federally *created* claim. In the case of a claim "necessarily dependent" on an issue of federal law, the pendency of a purely local claim destroys the federal jurisdiction, otherwise available, if the local claim might be dispositive.

Such a result undercuts the very reasoning that prompted Chief Justice Marshall to validate pendent jurisdiction in *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

> We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

*Id.* at 823. As Justice Rehnquist has more recently noted, "A different result [in *Osborn*] would have forced substantial federal cases into state courts for adjudication simply because they involved non-federal issues as well as federal ones." *Hagans* v. *Lavine*, 415 U.S. 528, 554 (1973) (Rehnquist, J., dissenting). The decision of the court of appeals is precisely that "different result."

Once federal question jurisdiction is established as to one claim, purely local causes of action do not destroy jurisdiction, but rather themselves become subject to it. In *Siler* v.

*Louisville & Nashville Railroad Co.*, 213 U.S. 175 (1909), this Court found federal jurisdiction even though the relief actually afforded plaintiff was based solely on the invalidation of a state regulation *on state law grounds*, leaving the federal constitutional questions unresolved. The Court stated:

> The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, *or even if it omitted to decide them at all, but decided the case on local or state questions only.*

*Id.* at 191 (emphasis added). *Siler* clearly provides that federal question jurisdiction endures, through the concept of pendent jurisdiction, even when the plaintiffs' actual recovery is ultimately based *solely* on the state law cause of action.

In *Hurn* v. *Oursler*, 289 U.S. 238 (1932), this Court expanded the scope of pendent jurisdiction beyond federal questions arising under the Constitution to include federal questions arising under federal statutes and regulations. The Court again sanctioned the retention of federal jurisdiction over purely local causes of action which had been "orphaned" by the dismissal of the claim raising a federal question which had originally conferred that jurisdiction.

*United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), reaffirmed the principle that federal jurisdiction is retained and pendent jurisdiction survives even though local causes of action are in themselves sufficient to afford the plaintiff *a* right to full relief. This Court upheld the jurisdiction of the lower federal court though it was "true that the [federal] claims ultimately failed and that the only recovery allowed was on the state claim." *Id.* at 728.

The decision of the appellate court below is fatally flawed by neglecting these rules of law. Federal question jurisdiction, once established, is not erased by the inclusion of a state-



created cause of action upon which the plaintiffs' entire recovery might be based.

The appellate opinion below allows a plaintiff relying on a necessary federal element to his claim, through artful pleading, to avoid federal jurisdiction merely by pleading an additional cause of action seeking the same relief but without reference to federal law. Federal jurisdiction will be sidestepped and substantial federal claims will be forced into state court merely because they involve non-federal issues incorporated by the plaintiff to avoid federal jurisdiction. *See*, *Hagans* v. *Lavine*, 415 U.S. 528, 554 (1973) (Rehnquist, J., dissenting). The precedent set by the appellate court below will allow a plaintiff to manipulate the pleadings such that a right to relief truly dependent on the resolution of federal law can be anchored to state court by a second cause of action seeking the same relief. Such manipulation cannot control the jurisdiction of the federal courts.

## CONCLUSION

The appellate court's opinion below conflicts with this Court's latest decision in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), and effectively eliminates the exercise of federal question jurisdiction when a claim arising under federal law is joined with a claim based on state law seeking the same relief. The importance of this jurisdictional question and its far-reaching implications cannot be overlooked. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 84-3418

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY JAMES CHRISTOPHER THOMPSON, et al.,
*Plaintiffs-Appellants*,
v.
MERRELL DOW PHARMACEUTICALS, INC.,
*Defendant-Appellee*.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed July 15, 1985

Before: JONES and KRUPANSKY, Circuit Judges; and HULL, Chief District Judge.*

JONES, Circuit Judge. This appeal presents the issue of whether actions filed in state court are properly removable to federal court if the complaints allege in part that the defendant violated the Food, Drug and Cosmetic Act and that this violation constituted "a rebuttable presumption of negligence." Plaintiffs-appellants contend that these cases presented no federal question upon which removal could be properly based. We agree and reverse and remand.

Plaintiffs-appellants, the Thompsons and the MacTavishes, are residents of Scotland and Canada respectively. They filed their complaints against defendant-appellee, Merrell Dow Pharmaceuticals, Inc., in the Court of Common Pleas, Hamilton County, Ohio. The complaints alleged that Mrs.

* Honorable Thomas G. Hull, District Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

Thompson and Mrs. MacTavish ingested Benedectin, a drug developed, produced, manufactured, and sold by Merrell Dow, and that the ingestion of the drug resulted in the birth defects suffered by both Jessica Thompson and Neil MacTavish. Each complaint alleged liability based upon the state-created theories of common law fraud, negligence, strict liability, and breach of warranty. They also alleged that Merrell Dow violated certain provisions of the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (FDCA) and that those violations establish a rebuttable presumption of negligence. Pursuant to 28 U.S.C. § 1441, Merrell Dow removed these actions to the district court where they were consolidated. Plaintiffs filed a motion to remand under § 1447(c) for lack of subject matter jurisdiction. The district court denied plaintiffs' motion to remand and granted Merrell Dow's motion to dismiss on the ground of forum non conveniens. Appellants then filed this appeal.

Removal jurisdiction in a federal district court is premised upon 28 U.S.C. § 1441. Section 1441(a) provides for removal of actions generally, and § 1441(b) limits a defendant's ability to remove actions from a state court to situations where the defendant is not a citizen of the state in which such action is brought. Section 1441(c) permits a district court to determine all issues raised in an action when one claim, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims. The standard for determining when an action is removable is whether the court would have had jurisdiction, subject to the limitations of § 1441(b), if the action had been instituted originally in federal court under 28 U.S.A. § 1331 or § 1332. *See Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 103 S. Ct. 2841, 2845 (1983). Consequently, a case removed to federal court under the guise of federal question jurisdiction presents a federal question when it "arises under" federal law. In *Franchise Tax Board*, *the Court* stated:

> Under our interpretations, Congress has given the lower courts jurisdiction to hear, originally or by removal from



> a state court, only those cases in which a well pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

*Id.* at 2856.

The parties agree that the FDCA does not create or imply a private right of action for individuals injured as a result of violations of the Act. Federal question jurisdiction would, thus, exist only if plaintiffs' right to relief *depended necessarily* on a substantial question of federal law. Plaintiffs' causes of action referred to the FDCA merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' causes of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court. *See Zeig* v. *Shearson/American Express, Inc.*, 592 F. Supp. 612, 613-14 (E.D. Va. 1984); *State of Florida ex rel. Broward County*, 329 F. Supp. 364, 366 n.3 (S.D. Fla. 1971).

Accordingly, the judgment of the district court is REVERSED and the case is REMANDED with instructions to remand the cases to the Court of Common Pleas for Hamilton County, Ohio, where they were first filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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MDL #486

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IN RE: RICHARDSON-MERRELL, INC.
"BENEDICTIN" PRODUCTS LIABILITY LITIGATION

THIS DOCUMENT RELATED TO:

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| *THOMPSON* | C-1-83-1436 |
| *MacTAVISH* | C-1-83-1437 |

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**ORDER DENYING PLAINTIFFS' MOTION TO REMAND (Doc. No. 979) AND GRANTING DEFENDANT'S MOTIONS TO DISMISS ON *FORUM NON CONVENIENS* GROUNDS**
**(Doc. Nos. 1132, Thompson; 1133, MacTavish)**
[Filed May 14, 1984]

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This matter is before the Court on plaintiffs' Motion (Doc. No. 979) to remand the above-captioned cases to the Court of Common Pleas, Hamilton County, Ohio, and on defendant's Motions (Doc. Nos. 1132 and 1133) to dismiss on *forum non conveniens* grounds. For the reasons which follow, plaintiffs' Motion will be denied and defendant's Motions will be granted.



## I. Motion to Remand

These cases were originally filed in the Court of Common Pleas, Hamilton County, Ohio, and removed by defendants to this Court pursuant to 28 U.S.C. § 1441. Removal was premised on this Court's jurisdiction over cases "arising under the Constitution, treaties or laws of the United States." *See* 28 U.S.C. § 1441(b). *See also* 28 U.S.C. §§ 1441(a), 1331.[1] Plaintiffs subsequently filed their Motion to Remand, asserting that federal-question jurisdiction was lacking and that the case had been improvidently removed from state court.[2]

Specifically at issue is the fourth cause of action in each Complaint. That cause of action, used by defendant as the basis for removal, alleges negligence resulting from defendant's alleged failure to comply with the labeling provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.* ("the Act"). After outlining pertinent provisions of the Act in Paragraphs 18 through 24 of each Complaint, plaintiffs set forth the following in Paragraphs 25 through 27:

> 25. That the promotion of said drug, Benedectin, by the defendant . . . constituted misbranding of said pharmaceutical drug per sub-sections (a), (f)(2) and (j) of § 502 and (u) of § 201 of [the Act].
>
> 26. That violation of said Federal Statutes in the promotion of said drug, Bendectin, by the Defendant herein enumerated, constitutes a rebuttable presumption of negligence.
>
> 27. That the Defendant's violation of said Federal Statutes directly and proximately caused the injuries suffered by [plaintiffs] . . .

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[1] Section 1441(c) provides for the removal of an entire of an entire case if it contains at least one "separate and independent claim or cause of action, which would be removable if sued upon alone." The district court may, in its discretion, determine all the issues in the case or remand those not within its original jurisdiction.

[2] The parties agree that federal-question jurisdiction provides the only arguable basis for removal of these cases.

The question facing the Court is whether plaintiffs' fourth cause of action states a claim "arising under" the laws of the United States.

In attempting to clarify the phrase "arising under," the Supreme Court has formulated definitions employing varying language. *See, e.g., Gully* v. *First National Bank*, 299 U.S. 109 (1936); *Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257 (1916).

Upon examination of the pertinent cases, this Court concludes that the definition set forth in *Smith, supra*, provides the appropriate standard for analysis. *Cf., T.B. Harms Co.* v. *Eliscu*, 339 F.2d 823, 827 (2nd Cir. 1964), *cert. denied*, 381 U.S. 915 (1965) (Smith was "path-breaking" opinion). *See also Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, ____ U.S. ____, 103 S.Ct. 2841, 2846 (1983).

In *Smith*, the Supreme Court stated the "general rule" as follows:

> [W]here it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction. . . .

*Smith, supra*, at 199.[3]

Applying the rule as stated in *Smith*, the Court concludes that federal-question jurisdiction exists over these cases and that they were properly removed. Although plaintiffs' fourth cause of action is technically a claim for negligence purusant

[3] This Court recognizes that *Smith* is in apparent conflict with *Moore, supra*, and that the conflict appears, at first blush, to be irreconcilable. *See*, M. Redish, *Federal Jurisdiction*, 67 (1980). However, subsequent federal court decisions have reconciled and distinguished the two cases on the basis of the state statutory schemes involved in each. *See Abrams* v. *Citibank*, 537 F.Supp. 1192, 1196 (S.D. N.Y. 1982). The case at bar is analagous to *Smith* and therefore distinguishable from *Moore*.



to state law, the sole basis for the claim is the alleged violation of the federal Act by defendant. Therefore, the key issue with respect to that cause of action is whether defendant's conduct violated the Act. Phrased in terms of the *Smith* standard, plaintiffs' "right to relief depends upon the . . . application of the . . . laws of the United States." *Smith, supra*, at 199. Accordingly, the Court holds that plaintiffs' fourth cause of action arises under the laws of the United States and that these cases were properly removed to federal court.[4] Plaintiff's Motion to Remand will be denied.

## II. Motions to Dismiss

The precise issues raised by defendant's Motions to Dismiss on *forum non conveniens* grounds have previously been considered by the Court under factual circumstances virtually identical with those at bar. *See order Granting Defendant's Motion to Dismiss* in *Vandervliet* (Doc. No. 1578) (facts virtually identical to *Thompson*); *In Re Richardson-Merrell, Inc.*, 545 F.Supp. 1130 (S.D. Ohio 1983), *aff'd. sub nom Dowling* v. *Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984) (facts identical to *MacTavish*). Defendant's Motion with respect to *Thompson* will be granted for the reasons set forth in *Vandervliet, supra*, and defendant's Motion with respect to *MacTavish* will be granted for the reasons set forth in *In Re Richardson-Merrell, Inc., supra*. The granting of each of defendant's motions is subject to the five conditions set forth in *Dowling, supra*, at 611, 616.

Accordingly, for the reasons set forth above, and subject to the conditions noted, plaintiffs' Motion to Remand (Doc. No. 979) is hereby DENIED and defendant's Motions to Dismiss on

[4] In asserting a lack of federal-question jurisdiction, plaintiffs argue, *inter alia*, that jurisdiction is lacking because no private right of action exists under the Act. The Court is not impressed by this argument. This is not a situation where plaintiffs are seeking some form of relief under the Act itself.

*forum non conveniens* grounds (Doc. Nos. 1132 and 1133) are hereby GRANTED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN, Chief Judge
United States District Court

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UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 84-3418

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LARRY JAMES CHRISTOPHER THOMPSON, et al.,
Plaintiffs-Appellants,

v.

MERRELL DOW PHARMACEUTICALS, INC., f/k/a
Richardson Merrell, Inc.,
Defendant-Appellee.

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Before: JONES and KRUPANSKY, Circuit Judges; and HULL, Chief District Judge.

**JUDGMENT**
[Filed July 15, 1985]

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.



ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded with instructions consistent with this opinion.

It is further ordered that Plaintiffs-Appellants recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE
COURT

John P. Hehman, Clerk

/s/ JOHN P. HEHMAN,
Clerk

ISSUED AS AMENDED MANDATE: August 15, 1985
COSTS: Awarded to appellant)

| | |
|---|---|
| Filing fee | $ 70.00 |
| Printing | $332.50 |
| Total | $402.50 |

A True Copy.

Attest:

/s/ GARY McCARTHY
Deputy Clerk

## Food, Drug and Cosmetic Act

52 Stat. 1040 § 201(n)
[21 U.S.C. § 321(n)]

**§ 321. Definitions; generally**
For the purposes of this chapter—

(n) If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining the labeling or advertising is misleading there shall be taken into account (among other things) not ony representations made or suggested by statement, word, design, device or any combinaton thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions or use as are customary or usual.

52 Stat 1040 § 502(a), (f)(2) and (j)
[21 U.S.C. § 352(a), (f)(2) and (j)]

**§ 352. Misbranded drugs and devices**
A drug or device shall be deemed to be misbranded—

**False or misleading label**

(a) If its labeling is false or misleading in any particular.

* * *

**Directions for use and warnings on label**

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Pro-*



*vided*, That where any requirement of clause (1) of this subsection, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement.

* * *

**Health-endangering when used as prescribed**

(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

COURT OF COMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A8307058

LARRY JAMES CHRISTOPHER THOMPSON and
DONNA LYNN THOMPSON as Next Friends and
Guardians of JESSICA ELIZABETH THOMPSON, A Minor
222 Church Street
Napanee, Ontario Canada K7R1C6

LARRY JAMES CHRISTOPHER THOMPSON, Individually
222 Church Street
Napanee, Ontario Canada K7R1C6

DONNA LYNN THOMPSON, Individually
222 Church Street
Napanee, Ontario Canada K7R1C6

Plaintiffs,

vs.

MERRELL-DOW PHARMACEUTICALS, INC.,
(formerly known as Richardson-Merrell, Inc.)
a Delaware Corporation
2110 East Galbraith Road
Cincinnati, Ohio 45215

Defendant.

**COMPLAINT AND JURY DEMAND**
[Filed September 1, 1983]

Now come the Plaintiffs, Larry James Christopher Thomp-



son and Donna Lynn Thompson as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, and Individually, and state their causes of action as follows.

**FIRST CAUSE OF ACTION**

1. The Plaintiffs, Larry James Christopher Thompson and Donna Lynn Thompson, as Next Best Friends and Guardians of Jessica Elizabeth Thompson, a Minor and Individually, state that they are residents of the City of Ontario, Country of Canada, Providence of Napanee.

2. That Defendant Merrell-Dow Pharmaceutical, Inc., FDBA Merrell-National Laboratories, Division of Richardson-Merrell, Inc., is a Delaware corporation with its principal place of business in the City of Cincinnati, County of Hamilton, State of Ohio.

3. That on or about December of 1978, Plaintiff Donna Lynn Thompson became pregnant with Jessica Elizabeth Thompson.

4. That during the first trimester of said pregnancy, Donna Lynn Thompson began to experience nausea for which her obstetrician prescribed the drug product known as Bendectin.

5. That said product, Bendectin, is a prescription drug made and distributed by the Defendant.

6. That Jessica Elizabeth Thompson was born September 21, 1979 subsequent to which it became obvious that the minor suffered from multiple deformities, including but not limited to, recto-vulvar fistula, anal atresia and sacral agenesis.

7. That as a result of said abnormalities, Jessica Elizabeth Thompson was caused to undergo extensive medical treatment and was and will continue to be required to undergo further medical treatment.

8. That the injuries suffered by Jessica Elizabeth Thompson were directly and proximately caused by the administration of the drug product Bendectin to Donna Lynn Thompson during the first trimester of pregnancy.

9. That the negligence of the Defendant in developing, marketing, producing, manufacturing, distributing and selling a product that Defendant knew or should have known could cause injuries and defects in children such as Jessica Elizabeth Thompson upon ingestion during pregnancy, directly and proximately caused said injuries; that the injuries were directly and proximately caused by the negligence of the Defendant in failing to test or inadequately testing the potential birth defect producing effects upon ingestion of Bendectin during pregnancy; that injuries were caused, directly and proximately by the negligence of the Defendant in failing to warn the users of Bendectin of the potential birth defect producing effects upon ingestion during pregnancy.

10. That as a direct and proximate result of the aforementioned negligence of the Defendant, Jessica Elizabeth Thompson was and will be caused to suffer considerable pain and suffering and to undergo further medical treatment, and Plaintiffs, Larry James Christopher Thompson and Donna Lynn Thompson, as parents of Jessica Elizabeth Thompson, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Larry James Christopher Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff, Donna Lynn Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## SECOND CAUSE OF ACTION

11. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 10 and for their Second Cause of Action state as follows.



12. That Defendant expressly and impliedly warranted that its product, Bendectin, was of merchantable quality and fit and safe for its intended purposes and uses.

13. That Defendant breached said express and implied warranties of merchantability, fitness and safety and that said breach directly and proximately caused the injuries suffered by Jessica Elizabeth Thompson, a Minor, and that as a direct and proximate breach of the aforementioned warranties, said Minor was and will be caused to suffer considerable pain and suffering, and to undergo continuous medical treatment, and Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as parents of Jessica Elizabeth Thompson were and will be caused to suffer considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff, Larry James Christopher Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff, Donna Lynn Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## THIRD CAUSE OF ACTION

14. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 13 and for their Third Cause of Action state as follows.

15. That Defendant is strictly liable in that it developed, marketed, produced, manufactured, distributed and sold an inherently dangerous and defective drug, to-wit Bendectin, which it knew or should have known could cause injuries and defects in children such as said Minor upon ingestion during pregnancy, while failing to test or inadequately testing the potential birth defect producing effects upon ingestion during

pregnancy and failing to warn the users of Bendectin of the potential birth defect producing effects upon ingestion during pregnancy.

16. That the foregoing acts and omissions of the Defendant directly and proximately caused the injuries suffered by said Minor and directly and proximately caused and will cause said Minor to suffer considerable pain and suffering and to undergo continuous medical treatment, and Plaintiffs, Larry James Christopher Thompson and Donna Lynn Thompson, as parents of Jessica Elizabeth Thompson, a Minor, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs, Larry James Christopher Thompson and Donna Lynn Thompson, as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Larry James Christopher Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff Donna Lynn Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## FOURTH CAUSE OF ACTION

17. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 16 and for their Fourth Cause of Action state as follows.

18. That the applicable Federal law covering the manufacturing and distributing of drugs during the time period in controversy was the Federal Food, Drug and Cosmetics Act passed by the 7th Congress on June 25, 1938, and cited as 52 Stat 1040, as amended.

19. That the purpose of 52 Stat 1040, among other purposes, was to prohibit the movement in Interstate Commerce of misbranded drugs.

20. That per § 201(n) of 52 Stat 1040, the determination as to whether a drug is misbranded includes "not only



representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences, which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary and usual".

21. That Defendant did not at any time during the time period in controversy, reveal or attempt to reveal any facts material to consequences which may result in the unborn offspring of mothers receiving the drug in question for indications relating to pregnancy.

22. That pursuant to § 502(a) of 52 Stat 1040, a drug is deemed misbranded if its labeling is false or misleading in any particular.

23. That pursuant to § 502(f)(2) of 52 Stat 1040, a drug is deemed misbranded unless its labeling bears "such adequate warning against use in those pathologic conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods, or duration of administration or application, in such manner and form, as are necessary for the protection of users".

24. That pursuant to § 502(j) of 52 Stat 1040, a drug is deemed misbranded if it is "dangerous to health when used in the dosage, or with the frequency of duration prescribed, recommended or suggested in the labeling thereof".

25. That the promotion of said drug, Bendectin, by the Defendant for the use in females during the time period in controversy, without revealing or attempting to reveal any facts material to consequences which may result in the unborn offspring of mothers receiving the drug, constituted misbranding of said pharmaceutical drug per sub-sections (a), (f)(2) and (j) of § 502 and (n) of § 201 of 52 Stat 1040.

26. That violation of said Federal Statutes in the promotion of said drug, Bendectin, by the Defendant herein enumerated, constitutes a rebuttable presumption of negligence.

27. That the Defendant's violation of said Federal Statutes directly and proximately caused the injuries suffered by said Minor and directly and proximately caused and will cause said Minor to suffer considerable pain and suffering and to undergo continuous medical treatment, and Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as parents of Jessica Elizabeth Thompson, a Minor, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs, Larry James Christopher Thompson and Donna Lynn Thompson, as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Larry James Christopher Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff Donna Lynn Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## FIFTH CAUSE OF ACTION

28. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 27 and for their Fifth Cause of Action state as follows.

29. The Defendant has made false and fraudulent representations of fact as to the safety, nontoxicity, and freedom from side effects of its product Bendectin and those representations were made under circumstances that the said Defendant knew or should have known that they were false, or alternatively, were represented to be true while said Defendant had no knowledge as to the truth thereof and the said Defendant stood to benefit financially by its misrepresentations, active and constructive. These representations were made in promotional literature, product inserts and by detailmen to prescribing physicians. By these representations



the Defendant worked a fraud and deceit upon the consuming public, and more particularly, upon the Plaintiffs.

30. The Defendant deliberately pursued a policy of nondisclosure with regard to adverse reactions attributable to the product Bendectin, especially, but not limited to, a number of reporting physicians, each reporting that a number of mothers who used Bendectin during pregnancy gave birth to physically deformed babies. The said Defendant thereby deprived the medical community and the public and the Plaintiffs of significant facts which, if known, would have permitted an informed judgment of the drug in light of the grave risks attending its use.

31. The Defendant failed to submit all relevant data bearing on the safety of the Drug Bendectin to the Food and Drug Administration, as required by law.

32. That the acts and omissions of the Defendant, as aforementioned, directly and proximately caused the injuries suffered by said Minor and directly and proximately caused and will cause said Minor to suffer considerable pain and suffering and to undergo continuous medical treatment, and Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as parents of Jessica Elizabeth Thompson, a Minor, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Larry James Christopher Thompson, Individually, had been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff Donna Lynn Thompson, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## SIXTH CAUSE OF ACTION

33. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 32 and for their Sixth Cause of Action state as follows.

34. The foregoing acts and omissions of the Defendant were willful, wanton and grossly negligent and caused, directly and proximately, the injuries to Plaintiffs as aforementioned, all to which Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, have been damaged in the amount of Twenty Two Million Five Hundred Thousand ($22,500,000.00) Dollars punitive damages; Plaintiff Larry James Christopher Thompson, Individually, has been damaged in the amount of Ten Million ($10,000,000.00) Dollars punitive damages; and Plaintiff Donna Lynn Thompson, Individually, has been damaged in the amount of Ten Million ($10,000,000.00) Dollars punitive damages.

WHEREFORE, Plaintiffs Larry James Christopher Thompson and Donna Lynn Thompson, as Next Friends and Guardians of Jessica Elizabeth Thompson, a Minor, demand Judgment against the Defendant in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages and Twenty Two Million Five Hundred Thousand ($22,500,-000.00) Dollars punitive damages; Plaintiff Larry James Christopher Thompson, Individually, demands Judgment against the Defendant in the amount of Five Million ($5,000,000.00) Dollars compensatory damages and Ten Million ($10,000,000.00) Dollars punitive damages; and Plaintiff Donna Lynn Thompson, Individually, demands Judgment against the Defendant in the amount of Five Million ($5,000,000.00) Dollars compensatory damages and Ten Million ($10,000,000.00) Dollars punitive damages.



Plaintiffs also demand all costs, interest and attorneys fees, and all other relief to which they may be entitled.

WAITE, SCHNEIDER, BAYLESS
& CHESLEY CO., L.P.A.

/s/ Stanley M. Chesley
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## JURY DEMAND

The Plaintiffs herein demand a trial by jury on all issues.

/s/ Stanley M. Chesley
TRIAL COUNSEL FOR
PLAINTIFFS.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A8307057

Neil Frazer MacTavish and Margaret MacTavish as Next Friends and Guardians of Neil MacTavish, A Minor
49 Bells Burn Avenue, LinLithgow, Scotland

Neil Frazer MacTavish, Individually
49 Bells Burn Avenue, LinLithgow, Scotland

Margaret MacTavish, Individually
49 Bells Burn Avenue, LinLithgow, Scotland
Plaintiffs,

v.

Merrell-Dow Pharmaceuticals, Inc., (formerly known as Richardson-Merrell, Inc.) a Delaware Corporation
2110 East Galbraith Road, Cincinnati, Ohio 45215
Defendant.

## COMPLAINT AND JURY DEMAND

[Filed September 1, 1983]

Now come the Plaintiffs, Neil Frazer MacTavish and Margaret MacTavish as Next Friends and Guardians of Neil MacTavish, a Minor, and Individually, and state their causes of action as follows.

### FIRST CAUSE OF ACTION

1. The Plaintiffs, Neil Frazer MacTavish and Margaret MacTavish, as Next Best Friends and Guardians of Neil MacTavish, a Minor, and Individually, state that they are residents of the City of LinLithogow, Country of Scotland.

2. That Defendant Merrell-Dow Pharmaceuticals, Inc.,



FDBA Merrell-National Laboratories, Division of Richardson-Merrell, Inc., is a Delaware corporation with its principal place of business in the City of Cincinnati, County of Hamilton, State of Ohio.

3. That on or about August of 1978, Plaintiff Margaret MacTavish became pregnant with Neil MacTavish.

4. That during the first trimester of said pregnancy, Margaret MacTavish began to experience nausea for which her obstetrician prescribed the drug product known as Bendectin.

5. That said product, Bendectin, is a prescription drug made and distributed by the Defendant.

6. That Neil MacTavish was born May 11, 1979 subsequent to which it became obvious that the minor suffered from multiple deformities, including but not limited to, complete absence of the right hand; both forearm bones are present, but there are no definite carpals.

7. That as a result of said abnormalities, Neil MacTavish was caused to undergo extensive medical treatment and was and will continue to be required to undergo further medical treatment.

8. That the injuries suffered by Neil MacTavish were directly and proximately caused by the administration of the drug product Bendectin to Margaret MacTavish during the first trimester of pregnancy.

9. That the negligence of the Defendant in developing, marketing, producing, manufacturing, distributing and selling a product that Defendant knew or should have known could cause injuries and defects in children such as Neil MacTavish upon ingestion during pregnancy, directly and proximately caused said injuries; that the injuries were directly and proximately caused by the negligence of the Defendant in failing to test or inadequately testing the potential birth defect producing effects upon ingestion of Bendectin during pregnancy; that injuries were caused, directly and proximately by the negligence of the Defendant in failing to warn the users of Bendectin of the potential birth defect producing effects upon ingestion during pregnancy.

10. That as a direct and proximate result of the aforementioned negligence of the Defendant, Neil MacTavish was and will be caused to suffer considerable pain and suffering and to undergo further medical treatment, and Plaintiffs, Neil Frazer MacTavish and Margaret MacTavish, as parents of Neil MacTavish, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs Neil Frazer MacTavish and Margaret MacTavish, as Next Friends and Guardians of Neil MacTavish, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Neil Frazer MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff, Margaret MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## SECOND CAUSE OF ACTION

11. The plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 10 and for their Second Cause of Action state as follows.

12. That Defendant expressly and impliedly warranted that its product, Bendectin, was of merchantable quality and fit and safe for its intended purposes and uses.

13. That Defendant breached said express and implied warranties of merchantability, fitness and safety and that said breach directly and proximately caused the injuries suffered by Neil MacTavish, a Minor, and that as a direct and proximate breach of the aforementioned warranties, said Minor was and will be caused to suffer considerable pain and suffering, and to undergo continuous medical treatment, and Plaintiffs Neil Frazer MacTavish and Margaret MacTavish, as parents of Neil MacTavish were and will be caused to suffer considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs Neil Frazer MacTavish and Margaret MacTavish, as Next Friends and Guardians of Neil MacTavish, a Minor, have been damaged in the amount



of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff, Neil Frazer MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff, Margaret MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## THIRD CAUSE OF ACTION

14. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 13 and for their Third Cause of Action state as follows.

15. That Defendant is strictly liable in that it developed, marketed, produced, manufactured, distributed and sold an inherently dangerous and defective drug, to-wit Bendectin, which it knew or should have known could cause injuries and defects in children such as said Minor upon ingestion during pregnancy, while failing to test or inadequately testing the potential birth defect producing effects upon ingestion during pregnancy and failing to warn the users of Bendectin of the potential birth defect producing effects upon ingestion during pregnancy.

16. That the foregoing acts and omissions of the Defendant directly and proximately caused the injuries suffered by said Minor and directly and proximately caused and will cause said Minor to suffer considerable pain and suffering and to undergo continuous medical treatment, and Plaintiffs, Neil Frazer MacTavish and Margaret MacTavish, as parents of Neil MacTavish, a Minor, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs, Neil Frazer MacTavish and Margaret MacTavish, as Next Friends and Guardians of Neil MacTavish, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Neil Frazer MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff Margaret MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## FOURTH CAUSE OF ACTION

17. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 16 and for their Fourth Cause of Action state as follows.

18. That the applicable Federal law covering the manufacturing and distributing of drugs during the time period in controversy was the Federal Food, Drug and Cosmetics Act passed by the 7th Congress on June 25, 1938, and cited as 52 Stat 1040, as amended.

19. That the purpose of 52 Stat 1040, among other purposes, was to prohibit the movement in Interstate Commerce of misbranded drugs.

20. That per § 201(n) of 52 Stat 1040, the determination as to whether a drug is misbranded includes "not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences, which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary and usual".

21. That Defendant did not at any time during the time period in controversy, reveal or attempt to reveal any facts material to consequences which may result in the unborn offspring of mothers receiving the drug in question for indications relating to pregnancy.

22. That pusuant to § 502(a) of 52 Stat 1040, a drug is deemed misbranded if its labeling is false or misleading in any particular.

23. That pursuant to § 502(f)(2) of 52 Stat 1040, a drug is deemed misbranded unless its labeling bears "such adequate warning against use in those pathologic conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods, or duration of administration or application, in such manner and form, as are necessary for the protection of users".



24. That pursuant to § 502(j) of 52 Stat 1040, a drug is deemed misbranded if it is "dangerous to health when used in the dosage, or with the frequency of duration prescribed, recommended or suggested in the labeling thereof".

25. That the promotion of said drug, Bendectin, by the Defendant for the use in females during the time period in controversy, without revealing or attempting to reveal any facts material to consequences which may result in the unborn offspring of mothers receiving the drug, constituted misbranding of said pharmaceutical drug per sub-sections (a), (f)(2) and (j) of § 502 and (n) of § 201 of 52 Stat 1040.

26. That violation of said Federal Statutes in the promotion of said drug, Bendectin, by the Defendant herein enumerated, constitutes a rebuttable presumption of negligence.

27. That the Defendant's violation of said Federal Statutes directly and proximately caused the injuries suffered by said Minor and directly and proximately caused and will cause said Minor to suffer considerable pain and suffering and to undergo continuous medical treatment, and Plaintiffs Neil Frazer MacTavish and Margaret MacTavish, as parents of Neil MacTavish, a Minor, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs, Neil Frazer MacTavish and Margaret MacTavish, as Next Friends and Guardians of Neil MacTavish, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Neil Frazer MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff Margaret MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.

## FIFTH CAUSE OF ACTION

28. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 27 and for their Fifth Cause of Action state as follows.

29. The Defendant has made false and fraudulent representations of fact as to the safety, nontoxicity, and freedom from side effects of its product Bendectin and those representations were made under circumstances that the said Defendant knew or should have known that they were false, or alternatively, were represented to be true while said Defendant had no knowledge as to the truth thereof and the said Defendant stood to benefit financially by its misrepresentations, active and constructive. These representations were made in promotional literature, product inserts and by detailmen to prescribing physicians. By these representations the Defendant worked a fraud and deceit upon the consuming public, and more particularly, upon the Plaintiffs.

30. The Defendant deliberately pursued a policy of nondisclosure with regard to adverse reactions attributable to the product Bendectin, especially, but not limited to, a number of reporting physicians, each reporting that a number of mothers who used Bendectin during pregnancy gave birth to physically deformed babies. The said Defendant thereby deprived the medical community and the public and the Plaintiffs of significant facts which, if known, would have permitted an informed judgment of the drug in light of the grave risks attending its use.

31. The Defendant failed to submit all relevant data bearing on the safety of the drug Bendectin to the Food and Drug Administration, as required by law.

32. That the acts and omissions of the Defendant, as aforementioned, directly and proximately caused the injuries suffered by said Minor and directly and proximately caused and will cause said Minor to suffer considerable pain and suffering and to undergo continuous medical treatment, and Plaintiffs Neil Frazer MacTavish and Margaret MacTavish, as parents of Neil MacTavish, a Minor, were and will be caused to incur considerable medical and other expenses and to suffer anxiety and anguish, all to which Plaintiffs, Neil Frazer MacTavish and Margaret MacTavish, as Next Friends and Guardians of Neil MacTavish, a Minor, have been damaged in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages; Plaintiff Neil Frazer MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages; and Plaintiff Margaret MacTavish, Individually, has been damaged in the amount of Five Million ($5,000,000.00) Dollars compensatory damages.



## SIXTH CAUSE OF ACTION

33. The Plaintiffs reallege and restate as if fully incorporated herein Paragraphs 1 through 32 and for their Sixth Cause of Action state as follows.

34. The foregoing acts and omissions of the Defendant were willful, wanton and grossly negligent and caused, directly and proximately, the injuries to Plaintiffs as aforementioned, all to which Plaintiffs Neil Frazer MacTavish and Margaret MacTavish, as Next Friends and Guardians of Neil MacTavish, a Minor, have been damaged in the amount of Twenty Two Million Five Hundred Thousand ($22,500,000.00) Dollars punitive damages; Plaintiff Neil Frazer MacTavish, Individually, has been damaged in the amount of Ten Million ($10,000,000.00) Dollars punitive damages; and Plaintiff Margaret MacTavish, Individually, has been damaged in the amount of Ten Million ($10,000,000.00) Dollars punitive damages.

WHEREFORE, Plaintiffs Neil Frazer MacTavish and Margaret MacTavish, as Next Friends and Guardians of Neil MacTavish, a Minor, demand Judgment against the Defendant in the amount of Ten Million ($10,000,000.00) Dollars compensatory damages and Twenty Two Million Five Hundred Thousand ($22,500,000.00) Dollars punitive damages; Plaintiff Neil Frazer MacTavish, Individually, demands Judgment against the Defendant in the amount of Five Million ($5,000,000.00) Dollars compensatory damages and Ten Million ($10,000,000.00) Dollars punitive damages; and Plaintiff Margaret MacTavish, Individually, demands Judgment against the Defendant in the amount of Five Million ($5,000,000.00) Dollars compensatory damages and Ten

Million ($10,000,000.00) Dollars punitive damages. Plaintiffs also demand all costs, interest and attorneys fees, and all other relief to which they may be entitled.

WAITE, SCHNEIDER, BAYLESS
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CO-COUNSEL FOR PLAINTIFFS

**JURY DEMAND**

The Plaintiffs herein demand a trial by jury on all issues.

/s/ STANLEY M. CHESLEY
TRIAL COUNSEL FOR PLAINTIFFS



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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CIVIL NO. MDL #486

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IN RE: "BENDECTIN" PRODUCTS LIABILITY
LITIGATION

**ORDER**
[Filed August 24, 1985]

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This matter is before the Court on various Plaintiffs' Motions to Remand and upon a *sua sponte* consideration of this Court's jurisdiction prompted by a recent reversal of a prior order denying a motion to remand. *Thompson* v. *Merrell Dow Pharmaceuticals, Inc.*, No. 84-3418 slip op. (July 15, 1985). Based on that Sixth Circuit opinion and an opinion by the Honorable S. Arthur Spiegel in *Griffin* v. *O'Neal, Jones & Feldman, Inc.*, 604 F. Supp. 717 (S.D. Ohio 1985), all Ohio plaintiffs shall be dismissed and all cases removed from Ohio state courts shall be remanded as outlined below.

Subject matter jurisdiction cannot be waived and can be raised at any time in the life of a case. Fed. R. Civ. P. 12(h)(3). Plaintiffs invoke this Court's jurisdiction under two of the statutory grants — 28 U.S.C. §§ 1331, 1332. (Doc. no. 1672) In addition, defendant relies on § 1331 as the basis for this Court's removal jurisdiction. (Doc. no. 1016 at 3)

The "arising under" jurisdiction of § 1331 was succinctly defined in a recent United States Supreme Court opinion.

> "Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right

to relief necessarily depends on resolution of a substantial question of federal law."

*Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).

Judge Spiegel has ruled recently, after a comprehensive analysis, that the Food, Drug and Cosmetic Act does not create or imply a private cause of action for persons injured as a result of violation of that act. *Griffin*, v. *O'Neal, Jones & Feldman, Inc.*, 604 F. Supp. 717 (S.D. Ohio 1905). Defendant apparently conceded this point before the Sixth Circuit. *Thompson* v. *Merrell Dow Pharmaceuticals, Inc.*, slip op. at 3. Further, the Sixth Circuit rejected defendant's position that plaintiffs' right to relief necessarily depends on resolution of a substantial question of federal law. *Id.* The jurisdiction of this Court over these cases cannot, therefore, rest on 28 U.S.C. § 1331.

Nor can this Court's jurisdiction rest on 28 U.S.C. § 1332. Defendant is a citizen of Ohio as its principal place of business is Ohio. *Id.* § 1332(c). As such, defendant does not share a diversity of citizenship with those plaintiffs who are also citizens of Ohio. Defendant has conceded this lack of diversity jurisdiction. (Doc. no. 1016 at 3 & n.5).

The result of the above analysis is that the Court does not have jurisdiction over the complaints brought by Ohio plaintiffs and over the cases removed from Ohio state courts. *See also* 28 U.S.C. § 1441(b). Fed. R. Civ. P. 21 states that "[m]isjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." This rule gives the Court the power to perfect its diversity jurisdiction by dismissing nondiverse parties provided that those nondiverse parties are not indispensable under Fed. R. Civ. P. 19. *Sams* v. *Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980). The Ohio plaintiffs herein are not of the type described in Rule 19.



As to those plaintiffs removed here from Ohio courts, 28 U.S.C. § 1447(c) provides that if at any time prior to final judgment "it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ." Final judgment has not yet been entered in this case as a Rule 59 motion is pending. *See* Fed. R. App. P. 4. *See e.g.*, *Live and Let Live, Inc.* v. *Carlsberg Mobile Home Properties, Ltd.*, 592 F.2d 846 (5th Cir. 1979).

In accordance with the foregoing, Ohio plaintiffs filing their complaints in Ohio district courts shall be DISMISSED without prejudice. A list of those cases and plaintiffs appear in Appendix A. All cases removed from Ohio state courts under 28 U.S.C. § 1441 shall be REMANDED to the courts from which they came. Those cases appear listed in Appendix B.

IT IS SO ORDERED.

/s/ Carl B. Rubin, Chief Judge
United States District Court

## APPENDIX A
Residents of Ohio

| CASE NO. | CASE NAME |
|---|---|
| C-1-81-069 | Robbin Eugene Thomas et al. |
| C-1-82-546 | Donald McCune et al. |
| C-1-82-657 | Barbara Twain |
| C-1-82-789 | Robert Faraday et al. |
| C-1-82-963 | Joseph Felnaus |
| C-1-82-964 | Irving Posenstein et al. |
| C-1-82-1039 | Kimberly Wykoff et al. |
| C-1-82-1343 | Charles Schneider et al. |
| C-1-82-1360 | Charles Wilfert |
| C-1-83-121 | Donald Drechsler |
| C-1-83-606 | Valerie Johnson |
| C-1-83-1018 | John Richard Noe et al. |
| C-1-83-1022 | Dennis Valentine |
| C-1-83-1185 | Philip Balsamo et al. |
| C-1-83-1186 | Charles Hubbard et al. |
| C-1-83-1187 | Charles Robinson et al. |
| C-1-83-1188 | Rosemary Reyland |
| C-1-83-1190 | Glen Wright et al. |
| C-1-83-1240 | Lawrence Meyers et al. |
| C-1-83-1474 | Daniel Eckert Behrens et al. |
| C-1-83-1438 | Peter Sargeant |
| C-1-83-1625 | Michael Wright |
| C-1-83-1713 | Randall K. Weber |
| C-1-83-1802 | Robert Matthews |
| C-1-83-1803 | Gail C. Craft |
| C-1-83-1848 | Robert Parker |
| C-1-83-1915 | John Doe |
| C-1-84-0034 | George Luis Rivera et al. |
| C-1-84-0134 | Mark E. Leyendecker et al. |
| C-1-84-0094 | Tina Lynn Schaefer |
| C-1-84-0136 | Millard Mach |
| C-1-84-0095 | Donald Thieken |
| C-1-84-0096 | Joseph A. Del Balso |
| C-1-84-0137 | Edward F. Graham |



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| C-1-84-0170 | Sandra Becker |
| C-1-84-0164 | David Hackenberry |
| C-1-84-0178 | Steven Garrett et al. |
| C-1-84-0260 | Delores Appling |
| C-1-84-0307 | Dale Edward Cahall et al. |
| C-1-84-0311 | Anthony William Strunks et al. |
| C-1-84-0336 | Ronald Stone et al. |
| C-1-84-0340 | Douglas Cox et al. |
| C-1-84-0371 | Mark Lukic et al. |
| C-1-84-0372 | Janet Getz et al. |
| C-1-84-0504 | Joseph Glen LaPaglin et al. |
| C-1-84-0595 | Carrie Blue Fletcher et al. |
| C-1-84-0900 | Gregory Koritansky et al. |
| C-1-84-0901 | Patricia West et al. |
| C-1-84-0955 | Charles Eberhardt et al. |
| C-1-84-1009 | Seth A. Wilkinson et al. |
| C-1-84-1215 | Randle J. Perry et al. |
| C-1-84-1293 | Sherry A. Foster et al. |
| C-1-84-1303 | Clayton M. Rust et al. |
| C-1-84-1307 | James G. Sinclair |
| C-1-84-1308 | David Bryan Saltsman et al. |
| C-1-84-1415 | David Parker |
| C-1-84-1424 | Dennis Kombrinch et al. |
| C-1-84-1485 | Robert John Appel et al. |
| C-1-84-1486 | Richard Cole et al. |
| C-1-84-1497 | John Kenneth Basalygo et al. |
| C-1-84-1497 | David M. Beiersdorfer |
| C-1-84-1497 | Leonard Anthony Bleh |
| C-1-84-1497 | Molly Jean Bradbury |
| C-1-84-1497 | Charles A. Cerino |
| C-1-84-1497 | Marion Clayton |
| C-1-84-1497 | John Conelly |
| C-1-84-1497 | Jesse Erkins et al. |
| C-1-84-1497 | Robert Martin Geist et al. |
| C-1-84-1497 | David Lee Highben |
| C-1-84-1497 | Keith Hungler et al. |
| C-1-84-1497 | Thomas Irving Jordan |
| C-1-84-1497 | Donald Lindeman et al. |

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| C-1-84-1497 | Steven George Lowe |
| C-1-84-1497 | John Michael Lucius |
| C-1-84-1497 | Bruce Alvin Reed et al. |
| C-1-84-1497 | Alvin Ward Scales |
| C-1-84-1497 | Thomas Raymond Schneider |
| C-1-84-1497 | Scott Thompson et al. |
| C-1-84-1497 | Frank Watson et al. |
| C-1-84-1499 | Michael R. Oliver et al. |
| C-1-84-1500 | Melessa Beel et al. |
| C-1-84-1501 | Billy Joel Watkins et al. |
| C-1-84-1502 | Deborah A. Jones |
| C-1-84-1503 | Aric D. McKee |
| C-1-84-1522 | Richard J. Caddell |
| C-1-84-1557 | Carolyn S. Shuff |
| C-1-84-1608 | Edward Armstrong |
| C-1-84-1614 | Billie J. Burton |
| C-1-84-1665 | Earl Gibson et al. |
| C-1-84-1665 | Timothy Ray Haar et al. |
| C-1-84-1665 | Joseph Edward Nourse |
| C-1-84-1665 | Horace Eugene Ralston |
| C-1-84-1665 | Gerald Norman Springer |
| C-1-84-1665 | Daniel Allard Uhl |
| C-1-84-1698 | Timothy Alan Cuthru et al. |
| C-1-84-1706 | Tiffany Lynn Lofties |
| C-1-84-1707 | Matthew J. Armstrong |
| C-1-84-1708 | Joseph Ryan Lorenzo |
| C-1-84-1773 | Michael Barker et al. |
| C-1-84-1774 | Charles Jones Sr. et al. |
| C-1-84-1813 | Roger F. Miller et al. |
| C-1-84-1814 | John R. Green et al. |
| C-1-84-1821 | Carolyn Ann Shaw et al. |
| C-1-84-1889 | Ruth M. Biggs et al. |
| C-1-84-1915 | Vivian Lee Davis et al. |
| C-1-84-1915 | Deborah Elaine Frye et al. |
| C-1-84-1915 | Boyd Jerome Graves |
| C-1-84-1915 | Steven David Knapp et al. |
| C-1-84-1915 | John Farrel Perkins et al. |
| C-1-84-1915 | Ronald S. Pretekin et al. |



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| C-1-84-1915 | Craig Douglas Tuner |
| C-1-84-1916 | Robert Francis Eder |
| C-1-85-0002 | Dana Patrick Connolly et al. |
| C-1-85-0002 | William P. Drozda et al. |
| C-1-85-0002 | Jesse James Erkins et al. |
| C-1-85-0002 | David Joseph Innes et al. |
| C-1-85-0002 | William V. Jackson et al. |
| C-1-85-0002 | Charles Stephen Marshall |
| C-1-85-0002 | Russell Rosen |
| C-1-85-0016 | Jon P. Roberts |
| C-1-85-0018 | Nevil Ray Curry |
| C-1-85-0018 | Patricia M. West |
| C-1-85-0018 | Stephen A. Kendall et al. |
| C-1-85-0018 | David W. Miller |
| C-1-85-0018 | Michael Prince |
| C-1-85-0018 | Anthony Arthur Williams Sr., et al. |
| C-1-85-0055 | Fred W. Baritell Jr. et al. |
| C-1-85-0055 | Rodney Goffinet et al. |
| C-1-85-0055 | Guillermo C. Guerigiendo et al. |
| C-1-85-0055 | Thomas Lee Levi et al. |
| C-1-85-0055 | James Alan Peach |
| C-1-85-0055 | James Robinson et al. |
| C-1-85-0055 | Thomas Joseph Thole |
| C-1-85-0055 | Timothy J. Waugh |
| C-1-85-0055 | Lonny Lee Wilson |
| C-1-85-0061 | Melissa L. Rosebury et al. |
| C-1-85-0106 | Mark W. Delp |
| C-1-85-0110 | Bruce Braddock |
| C-1-85-0118 | Ross Robert Burton |
| C-1-85-0123 | Angela Droste |
| C-1-85-0127 | Janet Ciepps et al. |
| C-1-85-0128 | Wanda Castro |
| C-1-85-0129 | Karl Woods |
| C-1-85-0130 | John Howell |
| C-1-85-0131 | John Howell |
| C-1-85-0136 | Joyce Marie Wallace et al. |
| C-1-85-0138 | Eileen Elfers et al. |
| C-1-85-0139 | William F. Downey et al. |

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| C-1-85-0139 | Louis Richard Kroner III et al. |
| C-1-85-0139 | Michael E. Laage |
| C-1-85-0139 | Charles E. Neal |
| C-1-85-0139 | Charles M. Sidwell |
| C-1-85-0139 | Linda L. Wagner |
| C-1-85-0140 | Sandra B. Jarman |
| C-1-85-0143 | David A. Stefek et al. |
| C-1-85-0167 | Jennifer Gerau |
| C-1-85-0188 | Marvin Leslie Montgomery et al. |
| C-1-85-0197 | Richard Frank Lawwell Jr. |
| C-1-85-0200 | Henry L. Bank et al. |
| C-1-85-0200 | Patricia Ann Stewart Ford |
| C-1-85-0200 | Stephen Wesley Poch Jr. |
| C-1-85-0200 | Dwight Bradley Dodrill |
| C-1-85-0205 | Deborah Mohn |
| C-1-85-0207 | Marlene Bettencourt |
| C-1-85-0209 | Timothy Michael Brown |
| C-1-85-0224 | David S. Soell |
| C-1-85-0225 | Thomas M. Murray |
| C-1-85-0226 | Joseph Christian Bang et al. |
| C-1-85-0227 | Billy Joe Johnson |
| C-1-85-0228 | Barbara Wallace |
| C-1-85-0237 | Ronald Kohlrieser |
| C-1-85-0244 | Clarence Freeman et al. |
| C-1-85-0244 | Inez Peck Spencer et al. |
| C-1-85-0256 | David Parker |
| C-1-85-0258 | R. Marc Sternberg |
| C-1-85-0269 | Diana Klein |
| C-1-85-0271 | Danny Edward Harrison |
| C-1-85-0277 | James R. Rice et al. |
| C-1-85-0279 | Michelle Meckanies |
| C-1-85-0280 | Peggy Schoonover |
| C-1-85-0282 | Evelyn Carol Bell |
| C-1-85-0282 | Charles J. Fritsch Sr. et al. |
| C-1-85-0282 | William Lyle Havens |
| C-1-85-0282 | John Tomaselli et al. |
| C-1-85-0286 | Kevin Colin Prather et al. |
| C-1-85-0287 | Dena Abdalla |



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| C-1-85-0288 | Brandon Lee McCroskey |
| C-1-85-0290 | Steven Dale Smith |
| C-1-85-0304 | Wagih S. Neirievz |
| C-1-85-0307 | Jennifer Deborde et al. |
| C-1-85-0308 | David E. Meek et al. |
| C-1-85-0309 | Kyle D. Dart |
| C-1-85-0310 | Bethany Blaha |
| C-1-85-0311 | Heather Black |
| C-1-85-0312 | Scott Herskovic |
| C-1-85-0313 | Victoria Samayon |
| C-1-85-0314 | Jean L. Kalt |
| C-1-85-0315 | Kellee Ann Love |
| C-1-85-0316 | Michael D. Valeries Sr. et al. |
| C-1-85-0318 | David Curtis |
| C-1-85-0318 | Ronald Kroninak |
| C-1-85-0319 | Carol Linda Curtis |
| C-1-85-0320 | Geraldine Roserie |
| C-1-85-0321 | Robert Carl DeHaven |
| C-1-85-0328 | Linda L. Benton |
| C-1-85-0335 | Everett Rogers et al. |
| C-1-85-0342 | Lynne G. Gamble |
| C-1-85-0344 | Wanda Jo Brown et al. |
| C-1-85-0346 | Donald Dale Bauer |
| C-1-85-0347 | Patricia Ann Ford |
| C-1-85-0347 | Conrad P. Foss |
| C-1-85-0347 | William Oldham II |
| C-1-85-0347 | Stephen Polk |
| C-1-85-0372 | Ascuncion A. Sautter |
| C-1-85-0373 | Dennis Roy Assenmacher et al. |
| C-1-85-0416 | Mark Ryan Mitchell |
| C-1-85-0505 | Dale Allen Sollts |
| C-1-85-0572 | Michael Huseman |
| C-1-85-0577 | Elizabeth L. Newman |
| C-1-85-0579 | Jerome L. Heckman |
| C-1-85-0606 | Patrick Pratt |
| C-1-85-0607 | Danny Wayne Brown |
| C-1-85-0611 | Annette Williams |

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| C-1-85-0612 | Charles S. Sprow |
| C-1-85-0613 | Shawn Beggs |
| C-1-85-0613 | Robert P. Bulan |
| C-1-85-0613 | Don R. Burton |
| C-1-85-0613 | Wayne E. Dearwester |

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## APPENDIX B

Cases removed from Ohio Courts

| CASE NO. | | |
|---|---|---|
| C-1-82-224 | C-1-84-1762 | C-1-85-538 |
| C-1-83-1436 | C-1-84-1788 | C-1-85-539 |
| C-1-83-1437 | C-1-85-161 | C-1-85-540 |
| C-1-84-226 | C-1-85-179 | C-1-85-541 |
| C-1-84-266 | C-1-85-180 | C-1-85-542 |
| C-1-84-400 | C-1-85-181 | C-1-85-543 |
| C-1-84-418 | C-1-85-297 | C-1-85-544 |
| C-1-84-519 | C-1-85-298 | C-1-85-545 |
| C-1-84-941 | C-1-84-1840 | C-1-85-546 |
| C-1-84-951 | C-1-84-1931 | C-1-85-547 |
| C-1-84-1026 | C-1-84-1942 | C-1-85-548 |
| C-1-84-1058 | C-1-84-1971 | C-1-85-549 |
| C-1-84-1064 | C-1-85-62 | C-1-85-550 |
| C-1-84-1135 | C-1-85-121 | C-1-85-551 |
| C-1-84-1301 | C-1-85-161 | C-1-85-552 |
| C-1-84-1315 | C-1-85-299 | C-1-85-553 |
| C-1-84-1426 | C-1-85-300 | C-1-85-624 |
| C-1-84-1446 | C-1-85-302 | C-1-85-692 |
| C-1-84-1541 | C-1-85-417 | C-1-85-715 |
| C-1-84-1580 | C-1-85-418 | C-1-85-716 |
| C-1-84-1839 | C-1-85-419 | C-1-85-717 |
| C-1-84-1590 | C-1-85-494 | |
| C-1-84-1616 | C-1-85-512 | |
| C-1-84-1726 | C-1-85-513 | |
| C-1-84-1727 | C-1-85-514 | |
| C-1-84-1749 | C-1-85-515 | |